July 16, 2003

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Petitioner: State of Washington

Date of Filing: July 14, 2003

Case Number: VPX-0001

On June 25, 2002, the Office of Hearings and Appeals (OHA) issued a decision on the State of Washington's appeal of a determination by the Office of Civilian Radioactive Waste Management (RW) denying its claim for a "payment equal to taxes" (PETT) grant based on the Washington Business and Occupation Tax ("B&O tax"). In that decision, we granted the appeal, held that RW erred in denying the State's PETT claim for the B&O tax, and remanded the case for further proceedings intended to assist the parties in achieving the final resolution of this matter. *State of Washington*, http://www.oha.doe.gov/cases/pett/vpa0001.htm. We are issuing this supplemental order to resolve the issues remaining in the case.

The present appeal is governed by the Notice of Interpretation and Procedures (NOIP) implementing the PETT provision in section 116(c)(3) of the Nuclear Waste Policy Act of 1982, (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy (DOE) will grant, to a State in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that State would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The history of the PETT program and the Basalt Waste Isolation Project and Near Surface Test Facility (collectively referred to as the BWIP) for characterization of a candidate site for a repository on the Hanford reservation in Washington State is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), http://www.oha.doe.gov/cases/pett/lpa0001.htm.

Reporting Requirements in the June 25, 2002 Decision

In the June 25, 2002 decision, we directed the parties to confer, and submit a joint report to the OHA including the following matters: (1) the DOE's treatment of business and income taxes in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the relevant grants to Indian Tribal Governments; and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002. Rather than the joint submission OHA envisioned, RW

submitted its own report addressing these matters, and the State submitted comments on the RW report. The ensuing portion of this supplemental order will discuss each element of the report in turn. As explained below, we hold for the State on each issue, direct RW to update the interest calculations through September 1, 2003 in accordance with our ruling on the proper interest rates, and order RW to pay the PETT grant to the State of Washington.

Several events occurred after OHA received the last of the post-decision submissions in the fall of 2002. In December 2002, OHA agreed to hold this matter in abeyance while RW pursued an attempt to revisit its determination in the 1991 PETT Notice that any PETT grants made to eligible jurisdictions would include interest. RW proposed to do this by requesting a ruling from the Comptroller General of the United States on RW's obligation, *vel non*, to include interest in PETT grants. On April 30, 2003, RW advised OHA that the Department decided against revisiting RW's interest obligation, and proposed the parties move forward immediately with mediation. The parties attempted to mediate a resolution of the appeal. The State, through its counsel, advised OHA on July 3, 2003 that the mediation was not successful and requested that we issue a final determination. That is where we are today.

(1) DOE's treatment of PETT business taxes in Nevada

Enclosure 1 to the report indicated that RW has made two types of PETT grants to the State of Nevada for business taxes: sales/use taxes, which are not at issue in the present appeal, and the Nevada Business Tax. RW indicated that it had made PETT grants to the State for the Nevada Business Tax, with interest, annually since that tax became effective July 1, 1991. RW points out that the Nevada Business Tax is not based on the gross receipts of the taxpayer, and it is not paid in a pyramided fashion like the Washington B&O tax. For these reasons, RW seems to imply that since the Nevada Business tax is relatively nominal in value, it may not be comparable to the B&O tax. Washington does not take issue with this aspect of the RW report, except to observe that equal treatment of the two states under the PETT statute requires payment of Washington's business tax. According to the State, it is immaterial that the B&O tax has greater importance in Washington's overall revenue-raising scheme than the Nevada Business tax does in Nevada. We agree with Washington, and we affirm our prior ruling that RW must make a PETT grant to Washington equivalent to the B&O tax, just as it paid the Nevada Business tax.

(2) The terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility

RW has accurately reported on the Federal legislation appropriating money for the BWIP site characterization efforts during FYs 1986, 1987, and 1988. These acts appropriated "lump sums" for the site characterization activities and, as such, do not present a situation where Washington law requires bifurcation for the purpose of applying varying B&O tax classifications and rates. As the State observes in its comment on this aspect of the report, RW appears not to be advocating bifurcation; rather it argues for the first time in this long proceeding that one tax rate, that for government contracting, be applied to the whole of the adjusted BWIP expenditures. We

agree with the State that the conditions for bifurcation of the B&O tax have not been met, and a single tax rate should be used.

(3) Grants to Indian Tribal Governments

The State agrees with RW's report that a total of $12,464,206 paid over the three fiscal years constituted grants to Indian Tribal governments. Based on our determination in the June 25, 2002 decision that grants should not included in "gross revenues" (or the equivalent) for purposes of the B&O tax, this amount should be excluded from the BWIP expenditures used to calculate Washington's PETT grant. In its recalculation of the PETT amount, RW properly has excluded the amount of the grant funds.

(4) Recalculation of Washington's PETT Claim, Based on the Period of Eligibility Determined by OHA, with Interest

Our June 25, 2002 decision determined that the period of the State's eligibility for PETT extended from May 28, 1986 until March 21, 1988. The original claim submitted by the State asserted a PETT entitlement from January 7, 1983 until December 22, 1987. In the claim, there is a breakdown between the periods January 7, 1983 through May 27, 1986 and May 28, 1986 through December 22, 1987. According to the State, after the decision in *Benton County* and well before the hearing in this case, the State sent a letter to RW's counsel asking for financial data so that it could calculate the amount of PETT due for the period December 23, 1987 through March 22, 1988. (State Ex. 4). Mr. Akerly testified that the State never received a response to this letter and thus he was unable to compute, prior to the hearing, the PETT due for what the State has dubbed the "stub period" of December 23, 1987 through March 22, 1988. Hearing Transcript (hereinafter cited as "Tr.") at 50-51. One of the reasons the June 25, 2002 decision directed RW to recalculate the PETT amount was to include the expenditures attributable to the "stub period."

However, RW's recalculation went beyond what OHA directed. That section of RW's report introduced a new set of numbers purporting to reflect the amounts spent on BWIP during the entirety of the eligibility period, not just for the "stub period." RW Report at 3-5. As the State observes, the newly revised BWIP expenditure amounts that RW's contractors produced are not part of the record of this case, they were "reconstructed" many years after the fact, they have not been subject to cross examination, and they are $11 million dollars less than the amount in the record. Since the B&O tax is based on the amount of BWIP expenditures, reducing the expenditures causes a corresponding reduction in the amount of the PETT grant before interest. We agree with the State that it is too late in the case, after years of position statements, briefing and an evidentiary hearing, for RW to try to inject a new set of recently "reconstructed" BWIP expenditure amounts into the record. Not only is there no evidentiary foundation for this information, but we are unable to understand where those numbers came from. Thus, we will require RW to recalculate the amount of Washington's PETT grant using the original BWIP expenditure figures for 1986 through1987 that were provided by Joanne Shadel of DOE to Frank Akerly of the Washington Department of Revenue (DOR), plus the newly presented BWIP expenditure amount for the "stub period."

In addition to the new BWIP expenditure figures for 1986-87, RW's recalculation used a B&O rate that RW has never before advocated at any point in the record of this proceeding. Instead of the "services and other activities" tax rate anticipated by the June 2002 OHA decision, RW now urges OHA to use the "government contracting" rate. The "government contracting" tax rate is 0.484 percent, about one-third of the "services and other activities" tax rate of 1.5 percent. This has the result of reducing the PETT amount before interest from $2,925,430 to $861,527. As the State points out in its comment, RW had many years in which to submit evidence and arguments about the proper tax rate for the BWIP site characterization, especially during the evidentiary hearing held in this case, and it chose not to offer any evidence on this issue. We agree that if RW wanted to preserve the argument it is now trying to raise at the eleventh hour, it should have presented alternative theories in the proceeding. Several of the witnesses (Akerly, Wiest, and Jaster) explained that the "government contracting" tax rate is normally used for government construction projects after construction has commenced, and that the BWIP site characterization encompassed only a small amount of temporary construction work, and primarily consisted of research and other activities. Thus, the record supports the State's position, which is also the result anticipated in the June 2002 OHA decision, that the "services and other activities" tax rate should properly be applied to the PETT recalculation.

Finally, RW's report uses an interest calculation that is inappropriate and cannot be sustained. The governing PETT Notice published by RW in 1991 states "Late payment shall include interest, if appropriate, in accordance with applicable requirements of the taxing jurisdiction." 56 Fed. Reg. at 42318. In *Benton County*, OHA recognized that interest on PETT amounts should be calculated according to applicable state law for the type of taxes involved. *Benton County*, slip op. at 15. Instead of using the interest rate required by Washington state law in RCW 82.32.050 for an ordinary taxpayer who is late in paying the B&O tax, RW's report used the rate used by the Federal courts for computing post-judgment interest. RW will be directed to recalculate the PETT amount using the appropriate interest rate prescribed by Washington State law, accrued from the dates when the B&O taxes were due initially. This result is necessary to carry out the language and the spirit of the PETT Notice and the governing statute.

Recalculation of PETT per OHA's decision

The State has recalculated the amount it claims for PETT based on OHA's June 2002 decision. Like RW, the State has calculated interest through December 31, 2002. The same format used by RW is followed; the data on page 8 of the RW report reflecting the State's claim are the same except for the extension of interest through the end of the year. As shown below, the total amount due the State for PETT for B&O taxes, with interest through December 31, 2002, is $6,759,964.

State's Current Position & Methodology	5/28-12/31/86	1/1-12/31/87	1/1-3/21/88	TOTALS
Akerly's Original Schedules Amount	$78,987,025	$114,028,162	0	$193,015,187
Additional Costs for 90 Days Prorated	0	1,127,376	10,146,387	11273763
Original Schedule Plus Costs for 90 Days	78,987,025	115,155,538	10,146,387	204,288,950
Less: Only Indian Grants Prorated	2,755,620	5,935,069	569,619	9,260,308

Akerly's Total Taxable Amounts	76,231,405	109,220,470	9,576,768	195,028,643
Service & Other Activity B & O Tax Rate	0.015	0.015	0.015	
B & O Tax @1.5 %	$1,143,471	$1,638,307	$143,652	$2,925,430
Total Interest Percent thru 12/31/02	136.99%	128%	119%	
Akerly Interest Amount thru 12/31/02	1,566,555	2,097,033	170,946	3,834,534
State's Sum as Currently Proposed 11/01/02	2,710,026	3,735,340	314,598	$6,759,964

We agree with this calculation. It uses the "original" BWIP expenditure amounts for 1986 and 1987 that are well established in the record, and RW's newly submitted amount for the so-called 90-day "stub period" after the 1987 Amendments to the NWPA were enacted into law on December 22, 1987. It eliminates the grants to Indian Tribes, it uses the B&O tax rate for "services and other activities," and it uses the interest rate dictated by Washington state law for late B&O tax payments.

Conclusion

As explained above, we have considered the post-June 2002 decision submissions from RW and the State, and determined that RW's recalculation of the PETT grant for the Washington B&O tax is erroneous in using (1) new numbers for the 1986 and 1987 BWIP expenditures that are unsupported by the record; (2) the B&O tax rate for "government contracting" which is unsupported by the record; and (3) the statutory interest rate applicable to judgments of Federal district courts. RW should have used the established numbers for the 1986 and 1987 BWIP expenditures; the B&O tax rate for "services and other activities," and the interest rate for late payment of B&O taxes under Washington law. The table above represents a proper recalculation of the State's PETT grant, with interest cumulated as of December 31, 2002. We will direct RW to update the interest calculation to determine the final amount of Washington's PETT grant as of September 1, 2003, and to pay that amount to the State without further delay.

It is Therefore Ordered that:

(1) The appeal filed by the State of Washington Department of Revenue of the determination by the DOE Office of Civilian Radioactive Waste Management (RW) denying its claim for a "payment equal to taxes" (PETT) grant based on the Washington Business and Occupation Tax ("B&O tax") is hereby granted as set forth above, and in our previous decision of June 25, 2002, *State of Washington*, http://www.oha.doe.gov/cases/pett/vpa0001.htm.

(2) RW shall update the interest calculation in accordance with the table in this supplemental order to determine the amount of Washington's PETT grant on September 1, 2003.

(3) RW shall forthwith pay the amount determined under paragraph (2) to the State of Washington in the manner specified in the Nuclear Waste Policy Act of 1982, as amended.

(4) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 16, 2003